A

Nadarajan a/l T Kuppusamy & Anor v Foo Pang Lui & Ors (as executor of the estate of Foo Chee Meng, deceased)

B

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO JA-22NCVC-34–02 OF 2016
SEE MEE CHUN J
7 JANUARY 2020

C

Succession — Probate — Validity of probate — Whether discrepancies of particulars in probate affected validity of probate — Whether agreements submitted admissible — Whether defendants bare trustees of land owned by plaintiffs' late father — Whether there was limitation period for cause of action based on trust

D

This was the plaintiff's claim against the first and second defendants for, inter alia, a declaration that the plaintiffs' late father T Kuppussamy a/l Thamdana Kaudana Kaudan was the beneficial owner of a piece of land known as HS(M) 1450 Lot 1443 Mukim Nyior, district of Kluang, Johor ('the land'). The plaintiff's claim was in their capacity as joint executors of Kuppusamy's estate pursuant to a grant of probate dated 18 December 1989. The first defendant was the administrator of the estate of Foo Chee Meng ('Foo') and the second defendant the representative of the estate of Lee Leng ('Lee'). The primary issues centred on the two agreements as to whether Foo and Lee were bare trustees for Kuppusamy and whether limitation had set in. The first defendant contended that ss 9 and 10 of the Limitation Act 1953 applied such that the plaintiffs' claim was statute barred .There were also preliminary issues raised by the plaintiffs concerning on the discrepancies in Kuppusamy's name and particulars of the land.

E

F

G

Held, allowing the plaintiffs' claim and dismissing the defendants' counterclaim:

H

(1) It was submitted by the first defendant counsel that the discrepancy in particular in the will and probate gave rise to whether the probate was valid. The court was of the view that although there were such discrepancies, the identity card number 1798398 of Kuppusamy was always the same. In the probate, the other property in the will namely HS(M) 2149 Lot 1978 Mukim Nyior had been successfully transmitted and transferred. Therefore, the discrepancy did not affect the validity of the probate then and would not affect it now (see paras 11–14).

I

(2) In the probate, the land was described as GSA 396 Mukim Nyior whereas what was being claimed was described as HS(M) 1450 Lot 1443 Mukim

Nyior. A perusal of the title for the land described as HSM(M) 1450 Lot 1443 had the words 'Tanah Rancangan' chopped on it and under the subheading 'no hakmilik asal' were the words RH 396. It rendered the reference to GSA 396 Mukim Nyior was now the reference to HSM(M) 1450 Lot 1443 Mukim, the land in question (see paras 15–16).

(3) The court was inclined towards the admissibility of the two agreements where the originals had been produced and the makers Foo, Lee and Kuppusamy had passed away. The primary documents in the form of the two agreements were produced where they were proved by the writing of the documents themselves. Where the makers of the two agreements had all passed on, it would be an appropriate case where the exception in s 73 applied. The two agreements could indeed be admitted as evidence and their contents admitted as the truth thereof (see paras 19, 22 & 25).

(4) Under the circumstances where there was no title issued at the time of the two agreements and where Lee and Kuppusamy had paid the purchase price, it would render Foo and Lee a bare trustee in relation to the land. Once Foo had received the full purchase price from Lee, all his rights and interest over the land had been extinguished and he was holding the said land as a bare trustee for Lee. Similary, once Lee had received the full purchase price from Kuppusamy, all of Lee's rights and interest over the land had been extinguished and the land was being held as a bare trustee for Kuppusamy and his successors in title (see para 30).

(5) As the court found that Foo and Lee were holding the land as bare trustees, ultimately in favour of Kuppusamy and beneficiaries, it followed that s 22 of Limitation Act applied such that there was no limitation for causes of action based on trust (see para 45).

[Bahasa Malaysia summary

Ini adalah tuntutan plaintif terhadap defendan pertama dan kedua bagi, antara lain, pengisytiharan bahawa mendiang bapa plaintif T Kuppussamy a/l Thamdana Kaudana Kaudan adalah pemilik benefisial sebidang tanah berketerangan HS(M) 1450 Lot 1443 Mukim Nyior, daerah Kluang, Johor ('tanah tersebut'). Tuntutan plaintif adalah di dalam kapasiti mereka sebagai pentadbir bersama hartanah Kuppusamy berdasarkan pemberian probet bertarikh 18 Disember 1989. Defendan pertama adalah pentadbir hartanah Foo Chee Meng ('Foo') dan defendan kedua sebagai wakil hartanah Lee Leng ('Lee'). Isu utama tertumpu kepada dua perjanjian sama ada Foo dan Lee adalah pemegang amanah Kuppusamy dan sama ada had masa telah bermula. Defendan pertama berpendapat bahawa ss 9 dan 10 Akta Had Masa 1953 telah terpakai menyebabkan tuntutan plaintif dihalang oleh undang-undang. Terdapat juga isu-isu awal yang dibangkitkan oleh pihak plaintif berkenaan dengan perbezaan nama Kuppusamy dan perincian tanah.

Diputuskan, membenarkan tuntutan penggugat dan menolak tuntutan balas defendan:

(1) Ianya telah dihujahkan oleh defendan pertama bahwa perbezaan khususnya dalam wasiat dan probet menimbulkan sama ada probet tersebut adalah sah. Mahkamah berpendapat bahawa walaupun terdapat perbezaan tersebut, nombor kad pengenalan 1798398 Kuppusamy adalah sama. Di dalam probet, harta lain dalam wasiat iaitu HS(M) 2149 Lot 1978 Mukim Nyior telah berjaya ditukarkan dan dipindahmilik. Oleh itu, perbezaan tersebut tidak mempengaruhi keesahan probet pada masa itu dan tidak akan mempengaruhi sekarang (lihat perenggan 11–14).

(2) Dalam probet, tanah tersebut dijelaskan sebagai GSA 396 Mukim Nyior sedangkan apa yang dituntut dijelaskan sebagai HS(M) 1450 Lot 1443 Mukim Nyior. Semakan pada hakmilik tanah yang dijelaskan sebagai HSM(M) 1450 Lot 1443 memiliki butiran 'Tanah Rancangan' yang dicopkan di atasnya dan di bawah tajuk kecil 'no hakmilik asal' adalah butir-butir RH 396. Ini merujuk kepada GSA 396 Mukim Nyior sekarang merujuk kepada HSM(M) 1450 Lot 1443 Mukim, tanah yang dimaksud (lihat perenggan 15–16).

(3) Mahkamah lebih cenderung terhadap penerimaan dua perjanjian yang asalnya telah dikemukakan dan pembuatnya Foo, Lee dan Kuppusamy telah meninggal dunia. Dokumen utama dalam bentuk dua perjanjian tersebut dihasilkan di mana ia dibuktikan dengan penulisan dokumen itu sendiri. Di mana pembuat kedua perjanjian telah meninggal, ianya akan menjadi kes yang sesuai di mana pengecualian dalam s 73 terpakai. Kedua-dua perjanjian itu memang boleh dikemukakan sebagai bukti dan kandungannya diakui sebagai kebenaran (lihat perenggan 19, 22 & 25).

(4) Dalam keadaan di mana tidak ada hak milik yang dikeluarkan pada masa kedua perjanjian tersebut dan di mana Lee dan Kuppusamy telah membayar harga belian, ianya akan menjadikan Foo dan Lee sebagai pemegang amanah yang berkaitan dengan tanah tersebut. Setelah Foo menerima harga belian penuh dari Lee, semua hak dan kepentingannya atas tanah tersebut telah dipadamkan dan dia memegang tanah tersebut sebagai pemegang amanah untuk Lee. Bersamaan, setelah Lee menerima harga belian penuh dari Kuppusamy, semua hak dan kepentingan Lee atas tanah tersebut telah dipadamkan dan tanah tersebut dipegang sebagai pemegang amanah untuk Kuppusamy dan penggantinya dalam hak milik (lihat perenggan 30).

(5) Oleh kerana mahkamah mendapati Foo dan Lee memegang tanah tersebut sebagai pemegang amanah, untuk Kuppusamy dan benefisiari,

maka s 22 Akta Had Masa terpakai sedemikian rupa sehingga tidak ada had masa terpakai untuk kausa tindakan berdasarkan amanah (lihat perenggan 45).] A

Cases referred to

Abdul Razak Sheikh Mahmood & Anor v Bhupinder Singh s/o Avtar Singh & Ors [2012] 3 MLJ 348, HC (refd) B
Chin Tai v Siow Shiow & Ors [1971] 1 MLJ 67, FC (refd)
Hassan bin Kadir & Ors v Mohamed Moidu bin Mohamed & Anor [2018] supp MLJ 266, FC (refd)
Oriental Bank Bhd v Uniphoenix Corp Bhd [2005] 7 MLJ 315, HC (refd) C
Pembinaan Kota Laksamana (Melaka) Sdn Bhd & Anor v Damansara Realty Berhad [2016] MLJU 1744, CA (refd)
Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149, FC (refd)
Temenggong Securities Ltd & Anor v Registrar Of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd) D

Legislation referred to

Evidence Act 1950 ss 62, 73A
Limitation Act 1953 ss 9, 10, 22 E

Siva Shanker (K Sila Dass) for the plaintiff.
GK Sritharan (GK Sritharan & Co) for the first defendant.
Mohd Khairi (Johor State Legal Advisor's Office) for the third and fourth defendants. F

See Mee Chun J:

INTRODUCTION

G

[1] This is the plaintiffs' claim against the first and second defendants for, inter alia, a declaration that the plaintiffs' late father T Kuppusamy a/l Thamdana Kaudan ('Kuppusamy') is the beneficial owner of a piece of land known as HS(M) 1450 Lot 1443 Mukim Nyior, Daerah Kluang, Johor ('the land'). H

[2] There is a counterclaim by the first defendant for a declaration he is the lawful owner of the land.

PARTIES I

[3] The plaintiffs' claim is in their capacity as joint executors of Kuppusamy's

A estate pursuant to a grant of probate dated 18 December 1989 (probate, B/7–8). The probate was marked as exh P3.

[4] The first defendant is the administrator of the estate of Foo Chee Meng ('Foo'), the second defendant the representative of the estate of Lee Leong ('Lee') and the third and fourth defendants the Land Administrator, Land Office Kluang and the Director of Lands and Mines, Johor respectively.

[5] Kuppusamy passed away on 18 September 1988 leaving a will dated 19 July 1988 (the will, C/2), Foo on 4 December 2013 and Lee on 13 March 1968. The will was marked as exh P7.

PREMISE OF CLAIM

[6] The claim is premised on an agreement of sale and power of attorney dated 12 September 1964 between Foo and Lee (B/29-32, the first agreement) where Foo sold the land to Lee for the sum of $1,000 and an agreement of sale and deed of substitution under power of attorney dated 14 July 1965 between Lee and Kuppusamy (B/33–36, the second agreement), where Lee sold the land to Kuppusamy for the price of $1,300.

[7] The claim first began as originating summons 24NcVc-170–03 of 2015 and by agreement on 6 January 2016 continued as a writ.

PRIMARY ISSUE

[8] The primary issue centres on the two agreements as to whether Foo and Lee were bare trustees for Kuppusamy and whether limitation has set in.

WITNESSES

[9] The witnesses for the plantiffs were:

(a) Munawarah bt Husin, advocate and solicitor, PW1 and witness statement marked as WSP1;

(b) the first plaintiff, PW2 and witness statement marked as WSP2;

(c) the second plaintiff, PW3 and witness statement marked as WSP3; and

(d) K Chelliah a/l Kuppusamy, PW4 and witness statement marked as WSP4.

The sole witness for the first defendant was the first defendant himself, DW1 and witness statement marked as WSD1.

PRELIMINARY ISSUES

Discrepancy in Kuppusamy's name

[10] It was acknowledged by the Plaintiffs there were discrepancies in Kuppusamy's name in relation to his father's name where it varied from s/o Thampana Kavundan (second agreement), s/o Thampana Kavundan (the will), a/l Thampan Kavadan (probate), a/l Thamdana Kaudan (extract from National Registration Department) whereas in the cause papers it was a/l Thamdana Kaudan.

[11] It was submitted by the first defendant counsel that the discrepancy in particular in the will and probate gave rise to whether the probate was valid. There was also no application to amend the probate.

[12] The court is of the view that although there were such discrepancies, the identity card number 1798398 of Kuppusamy was always the same. This is evident from the second agreement in B/33, the will in C/2, a land search in J/23 and an extract from National Registration Department in J/3.

[13] Further, in the probate, the other property in the will namely HS(M) 2149 Lot 1978 Mukim Nyior had been successfully transmitted and transferred as shown in J/22–23. This was also the evidence of PW2 (NOP/35–36).

[14] Therefore the discrepancy did not affect the validity of the probate then and would not affect it now.

Particulars of the land

[15] An issue of the particulars of the land being different from the probate was also raised. In the probate the land was described as GSA 396 Mukim Nyior whereas what was being claimed now was described as HS(M) 1450 Lot 1443 Mukim Nyior.

[16] A perusal of the title in B/1-4 for the land now described as HSM(M) 1450 Lot 1443 has the words 'Tanah Rancangan' chopped on it and under the sub heading 'no hakmilik asal (tetap atau sementara)' were the words 'RH 396'. This renders it probable the reference to GSA 396 Mukim Nyior is now the reference to HSM(M) 1450 Lot 1443 Mukim, the land in question.

[17] Further, the first defendant in para 25 of defence and counterclaim (A/29) had referred to the land as previously known as GSA 396. This was pleaded as follows:

A

25. Bahawa Si mati iaitu bapa kepada Defendan Pertama yang bernama Foo Chee Meng adalah pemilik berdaftar sebidang tanah yang dipegang di bawah HS(M) 1450 Lot 1450 yang terletak di dalam Mukim Niyor, Daerah Kluang, Johor yang berkeluasan sementara 7,992 ekar (dahulunya dikenali sebagai GSA No 396, Mukim Nyior, Daerah Kluang, Johor.

B

THE TWO AGREEMENTS

Admissibility

C

[18] The first agreement was marked as ID4 and the second agreement as ID5. Parties were directed to submit on their admissibility with only the plaintiffs' counsel addressing the issue in its submission.

D

[19] Upon a careful deliberation of the submission, this court was inclined towards the admissibility of the two agreements where the originals had been produced and the makers Foo, Lee and Kuppusamy have since passed away.

[20] Section 62 of the Evidence Act 1950 provides as follows:

E

62 Primary evidence means the document itself produced for the inspection of the court.

[21] In *Oriental Bank Bhd v Uniphoenix Corp Bhd* [2005] 7 MLJ 315 it was stated at pp 327–328:

F

[21] Without a doubt, the documentary evidence assisted the plaintiff in proving its case. When human memory fails, documentary evidence would be the best evidence. Indeed, the imprefection of the human memory can never be doubted. It is always ideal to produce the primary documentary evidence of a transaction. The document itself must be produced in order to prove the terms of the contract. Lord Tenterden in *Vincent v Cole* (1828) M & M 258 aptly said —

G

> I have always acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of a written instrument; they may be so easily mistaken that I think the purpose of justice require the strict enforcement of the rule.

H

[22] Here the primary documents in the form of the two agreements were produced where they were proved by the writing of the documents themselves.

I

[23] As to the contents of the two agreements, s 73A of the Evidence Act provides as follows:

73A Admissibility of documentary evidence in civil case, etc.

(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following condition are satisfied:

...

(b) if the maker of the statement is called as a witness in the proceeding:

Provided that the condition that the maker of the statement shall be called as a witness seed not be satisfied if he is dead, ...

[24] In *Pembinaan Kota Laksamana (Melaka) Sdn Bhd & Anor v Damansara Realty Berhad* [2016] MLJU 1744 it was stated at p 5 of 9:

[27] ... it is trite law that when a document was sought to be admitted as evidence in order to establish the truth of the facts contained in it, the maker has to be called (see: *Allied Bank (Malaysia) Bhd v Yau Hok Hua* [1998] 6 MLJ 1).

[28] Nevertheless, a party seeking to adduce a document in order to prove the truth of its contents without calling the maker can resort to the exception specified in s 73A of the Evidence Act 1951, on condition that he satisfies the conditions laid down therein. ...

[25] Where the makers of the two agreements, Foo, Lee and Kuppusamy have all passed on, this surely would be an appropriate case where the execption in s 73A applies. The two agreements can indeed be admitted as evidence and their contents admitted as the truth thereof.

Effect

[26] In the first agreement, Foo had sold the land to Lee. In preamble No 3 it was stated the title deed to the land has not yet been issued in Foo's name. Pursuant to para 3, Lee as the purchaser was appointed to apply for an early issue of the title deed and to execute the transfer.

[27] Subsequently by the second agreement, Lee sold the land to Kuppusamy. In preamble No 2 it was stated that Lee was the registered owner by virtue of the first agreement between Foo and himself and that the first agreement contained a clause empowering Lee to appoint a substitute. Paragraph 4 then stated Kuppasamy was appointed as the true and lawful attorney to complete the purchase of the said land.

[28] In the first agreement, paragraph 1 stated the sum involved was $1,000 and in para 2 that Lee was forthwith given possession of the land and entitled to all profits derived from the land. This would give rise to the probability the sum involved had been paid.

[29] In the second agreement, para 2 stated the purchase price of $1,300 'shall immediately be paid upon the signing of this agreement (the receipt of which sum the vendor hereby acknowledges)'. This would mean Kuppusamy had paid the purchase price and Lee acknowledged its receipt.

[30] Under the circumstances where there was no title issued at the time of the two agreements and where Lee and Kuppusamy had paid the purchase price, this would render Foo and Lee a bare trustee in relation to the land. Put another way, once Foo had received the full purchase price from Lee all his rights and interest over the land had been extinguished and he was holding the said land as a bare trustee for Lee. Similarly, once Lee had received the full purchase price from Kuppusamy, all of Lee's rights and interest over the land had been extinguished and the land was being held as a bare trustee for Kuppusamy and his successors in little.

[31] The Federal Court case of *Hassan bin Kadir & Ors v Mohamed Moidu bin Mohamed & Anor* [2018] supp MLJ 266 at p 276 has laid down the principle that the torrens system does not prevent the creation of beneficial trust. This was what was said:

> [24] It is trite that the modified form of the Torrens System of registration of titles relating to alienated land as applied under the Code does not prevent the creation of beneficial interest in the land whether under 'express trust', 'constructive trust' or 'resulting trust' arising out of the operation of law. This is derived from the rules of equity which is applicable in this country by virtue of the s 3 of the Civil Law Act 1956. And as was said by Syed Agil Barakbah SCJ in *Liaw Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449:
>
> > The Code restricts the kinds of interest in the land which are capable of being registered, but at the same time, it does not prevent or restrict the creation of beneficial interest in land by way of equitable trust ... Prior to the registration of the title, the statutory form of transfer under the Code gives a little in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as constructive trustee.

[32] The cases of *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149 and *Temenggong Securities Ltd & Anor v Registrar Of Titles, Johore & Ors* [1974] 2 MLJ 45 have expressed the position that where there is a valid sale and purchase agreement, the beneficial ownership passes to the purchaser. In *Peninsular Land Development* it was stated at p 151:

> ... the company becomes in equity a trustee for the plaintiff and the beneficial ownership passes to the plaintiff as soon as the purchase price has been paid. As was said by Jessel MR at p 506 in *Lysaght v Edwards* (1876) 2 Ch D 499:
>
> > It appears to me that the effect of a contract for sale has been settled for more than two centuries; ... it is that the moment you have a valid contract for sale the

vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to retain possession of the estate until the purchase money is paid, in the ebsence of express contract as to the time of delivering possession.

[33] In *Temenggong Securities* it was stated at p 47:

The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follows, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[34] In this instant case the full purchase price has been paid to Foo and then Lee, such that Foo has no interest over the land and ultimately a bare trustee to Kuppusamy and/or the plaintiffs.

UNINTERRUPTED POSSESSION

[35] It was also the unchallenged evidence of the plaintiffs that Kuppusamy and then a brother Chelliah (PW4) had been in occupation of the land since the purchase. It was the evidence of PW2 that when Kuppusamy bought the land, it was vacant and Kuppusamy planted rubber trees and personally tended to the land. He and his brothers would help work the land. No one came to claim the land before and after his father's death (Q&A 13, 14, 16 and 17).

[36] According to PW3, the land had been bequeathed to him according to the will but he had voluntarily given it to PW4 who was now working on it. He had done it as it was family land and so long as it was held by a family member (Q&A 11). PW4 said he had been working on the land since he was ten years old and he took over the land in 1996. Around that time he spent about RM25,000 to switch to oil palm trees, including clearing the land (Q&A 7). During the time he worked the land, no one came forth to make any claim (Q&A 12).

[37] It was also the evidence that PW2 had been paying the quit rent from 1998–2005 and PW4 from 2006–2019, other than 2015 and 2016. The receipts for 2010, 2012 to 2014 are in B/19–22 and for 1999–2008 and 2017–2019 are in J/9-21. It was not disputed the first defendant had paid quit rent for 2015 and 2016. Although these were not all the receipts, the plaintiffs at least managed to produce some, and these would point towards them being in occupation and control of the land.

A RESTRICTION IN INTEREST

[38] The land contained a restriction in interest it could not be transferred without the approval of the State Authority (*tidak boleh dijual tanpa kebenaran Penguasa Negeri*). The evidence showed no approval had been obtained. However this does not negate the validity of the two agreements. This is because of the principle laid down in *Chin Tai v Siow Shiow & Ors* [1971] 1 MLJ 67, that a contract of sale is valid although there can be no transfer by specific performance without the permission of the collector for the transfer being obtained. At p 69 it was stated:

> ... The only impediment to a transfer by way of specific performance as prayed in a counterclaim, is a requirement of the necessary permission. In the circumstances I think the application for such permission may be made by the first defendant, supported by a copy of this judgment as grounds of her application and by virtue of the agreement.

[39] It was contended that *Chin Tai* could be distinguished where the issue in that case was fraud. In that case it was held that the defendant who counterclaimed for specific performance was aware of the restriction against dealing. Similarly in this case there is no evidence that Foo or Lee knew of the restriction in interest and the suggestion this was the reason the transfer from Lee to Kuppusamy could not be effected remained at best a suggestion. Similarly the contention that at the time of the two agreements there was no such restriction in interest and such restriction was imposed when the title was issued in 1986 was not supported by any evidence.

[40] Ultimately the two agreements are still valid.

EXPRESS CONDITION THAT LAND TO BE PLANTED WITH RUBBER TREES

[41] It was not disputed that an express condition of the land (B/1) was as follows:

> 1. Tanah yang terkandung dalam hakmilik ini hendaklah dengan pokok-pokok getah. Tanaman-tanaman lain boleh juga ditanam di atas tanah ini dengan syarat pemilik tanah hendaklah mendapat kebenaran secara bertulis daripada Pentadbir Tanah Daerah terlebih dahulu akan pertukaran jenis tanaman itu serta keluasan tanamannya.

[42] It was contended by the first defendant there had been a breach of the express condition where no consent had been obtained for the land now being planted with oil palm trees. In particular the evidence of PW4 was he had cleared the land off the rubber trees and planted with oil palm trees. Although consent had not been obtained, the court found this cannot affect the legality

of the two agreements for the same reasons as above.

LIMITATION

[43] The first defendant had contended that ss 9 and 10 of the Limitation Act 1953 applied such that the plaintiffs' claim was statute barred. The aforesaid provision reads as follows:

> 9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person throught whom he claims, to that person.
>
> ...
>
> 10(2) Where any person brings an action to recover any land of a deceased person whether under a will or intestacy and the deceased person was on the date of his death in possession of the land and was the last person entitled to the land to be in possession thereof the cause of action shall be deemed to have accrued on the date of his death.

[44] Accoding to the first defendant, limitation could run from 1986 when the title was first issued and collected by PW2 or even after probate was granted on 18 December 1989. By these dates, limitation would have long set in.

[45] However as the court had earlier found that Foo and Lee were holding the land as bare trustees, ultimately in favour of Kuppusamy and/or beneficiaries, it follows that s 22 of the Limitation Act applies such that there is no limitation for causes of action based on trust. Section 22 provides:

> 22(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> ...
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received bt the trustee and converted to his use.

[46] In *Abdul Razak Sheikh Mahmood & Anor v Bhupinder Singh s/o Avtar Singh & Ors* [2012] 3 MLJ 348 it was held at p 363:

> [28] It follows from the above that causes of action for specific performance of a contract which involve or encompass the recovery of trust property by a beneficiary from a trustee is not caught by the limitation period of six years prescribed under s 6(6), but is subject to s 22 which requires that either sub-s (a) or (b) be proved whereupon no limitation period applies.

A CLAIM AGAINST THE THIRD AND FOURTH DEFENDANTS

[47] There was effectively no claim against the third and fourth defendants. What was sought against them was that they shall allow the transfer and ownership of the land to the second plaintiff to the register of titles (para 21 viii of statement of claim).

B

CONCLUSION

[48] The plaintiffs' claim was thus allowed and the first defendant's counterclaim was dismissed.

C

Plaintiff's claim allowed and defendant's counterclaim dismissed.

Reported by Mohd Kamarul Anwar

D

E

F

G

H

I